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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 110

WILLIAM MALLOY, PETITIONER,

vs.

PATRICK J. HOGAN, SHERIFF OF HARTFORD COUNTY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED APRIL 19, 1963

CERTIORARI GRANTED JUNE 3, 1963

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Superior Court of Hartford County, State of Connecticut		
Petition for writ of habeas corpus	1	1
Writ of habeas corpus	1	2
Return of respondent	2	3
Exhibit A—Mittimus	4	5
Petitioner's reply	5	6
Memorandum of decision, Covello, J.	5	6
Judgment	11	13
Application for certification and order	12	14
Plaintiff's appeal	12	14
Request for finding and draft finding	13	15
Finding, Covello, J.	14	16
Assignment of errors	19	22
Correction to finding, Covello, J.	21	24
Stipulation as to judgment in companion cases—Eugene Picano, No. 124067	21	24
Stipulation as to judgment in companion cases—George Polashian, No. 124065	22	25

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	Original	Print
Proceedings in the Supreme Court of Errors of Connecticut	23	26
Opinion, King, J.	23	27
Judgment	27	36
Clerk's certificate (omitted in printing)	28	36
Order allowing certiorari	29	37

[fol. 1]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124068

WILLIAM MALLOY, of Windsor,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

PETITION FOR WRIT OF HABEAS CORPUS—January 26, 1961

To the Superior Court now in Session in the County of Hartford:

Comes William Malloy, a resident of the Town of Windsor, praying a writ of habeas corpus and complains and says:

1. He is now being held and confined in the county jail in said County of Hartford by Patrick J. Hogan, Sheriff of said county and keeper of said jail.

2. Said imprisonment is illegal in that his imprisonment is unlawful on the ground that his constitutional rights under the Fifth Amendment to the Constitution of the United States and Article 1, Sec. 9, of the Constitution of the State of Connecticut were violated in that he was denied the right to refrain from answering questions before a Grand Jury that would tend to incriminate him.

3. The complainant prays that this court issue a writ of habeas corpus to bring him before said court so that justice may be done.

Dated at Hartford, this 26th day of January, 1961.

William Malloy, By Harold Strauch, His Attorney.

Personally appeared the above named William Malloy and made oath that he verily believes that he is illegally deprived of his liberty for the reasons hereinbefore stated, before me.

Harold Strauch, Commissioner of the Superior Court.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

WRIT OF HABEAS CORPUS—January 27, 1961

William Malloy, of Windsor, having made application to the Superior Court in and for the County of Hartford alleging that he is illegally held and confined in the county jail in said county by Patrick J. Hogan, the keeper thereof, and prays a writ of habeas corpus, It Is Ordered:

[fol. 2] That the said Patrick J. Hogan, keeper of said jail, bring the said William Malloy before the said court at the court house in said county on the 1st day of February, 1961, at 10:00 o'clock in the forenoon, with the cause of his confinement, that justice may be done; and it is further ordered that the clerk of said court forthwith place in the hands of said Patrick J. Hogan, Sheriff and keeper as aforesaid, or one of his deputies, a true and attested copy of the above application, of this order, and due return make.

Dated at Hartford, this 27th day of January, 1961.

By the Court,

Dominic A. DiCorleto, Assistant Clerk.

To Any Deputy Sheriff of the County of Hartford or Any Constable of the City of Hartford—Greeting:

By Authority of the State of Connecticut, You are hereby commanded without delay to put a true and attested copy of the foregoing writ of habeas corpus into the hands of

the said Patrick J. Hogan, Sheriff of the County of Hartford, and make immediate return of said writ and of this order and of all your doings thereon, on the penalty of the law.

Dated at Hartford, Connecticut, this 27th day of January, 1961.

By the Court,

Dominic A. DiCorleto, Assistant Clerk of the Superior Court.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

RETURN OF RESPONDENT—Filed January 31, 1961

The Respondent in obedience to the order of the Court to show cause why a writ of habeas corpus should not be granted responds and says that the Petitioner, William Malloy, is in no manner without law or right confined, imprisoned or deprived of his liberty, and further avers:

First Defense:

1. That the Respondent is the Correctional Director of Hartford State Jail, and is the keeper of said common jail in the Town of Hartford, County of Hartford.

[fol. 3] 2. That on January 26, 1961, the Petitioner was duly delivered into the keeping of the Respondent as said Correctional Director of Hartford State Jail and keeper of said common jail, together with a mittimus issued by the Clerk of the Superior Court for the County of Hartford directing that the Respondent as such Director and keeper of said Jail receive and safely keep said Petitioner within said Jail at his own expense, until he answers proper questions put to him in the course of an investigation conducted under the provisions of Section 54-47 of the Connecticut General Statutes, or until further order of the Court.

3. A copy of said mittimus is hereto attached marked, "Exhibit A."

4. The Respondent holds the Petitioner by virtue of the foregoing proceedings.

Second Defense:

The allegations set forth in the petition are denied.

Respectfully submitted,

Patrick J. Hogan, Correctional director of Hartford State Jail and keeper of said common jail, By John D. LaBelle, State's Attorney for Hartford County.

To the Sheriff of Hartford County, His Deputy, or to Either of the Constables of the Town of Windsor, in said County,

Greeting:

Whereas, William Malloy of Windsor, in said County was presented to the Superior Court holden at Hartford, within and for the County of Hartford, in the State of Connecticut at the term held on the first Tuesday of January, 1961, that is to say, on the 26th day of January, 1961, upon a complaint by John D. LaBelle, State's Attorney for Hartford County, that the said William Malloy failed to answer proper questions propounded to him in the course of an investigation conducted under the provisions of Section 54-47 of the General Statutes, and the Court after hearing has found that the said William Malloy has failed to answer proper questions in the course of such investigation and that he ought to be punished as for a contempt, [fol. 4] and it was ordered by said Court that he be committed to the Common Jail in said County, there to remain at his own expense, until he answers proper questions in the course of such investigation, or until further order of the Court, in accordance with Sections 54-47 and 51-35.

These Are, Therefore, by authority of the State of Connecticut, to command you to take and convey the said William Malloy to the Common Jail, in the Town of Hartford, in said County, and him deliver to the keeper thereof, and to leave with him this mittimus, and said keeper is hereby commanded to receive and safely keep the said William Malloy within said Jail at his own expense, until he answers proper questions in the course of said investigation, or until further order of the Court.

Hereof fail not.

Dated at Hartford, this 26th day of January, 1961.

EXHIBIT A TO RETURN OF RESPONDENT

By Order of said Court,

JOSEPH KEEFE,
Assistant Clerk of the Superior Court.

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, ss.:

Hartford, January 26, 1961.

Then and by virtue hereof, I took the within named William Malloy and conveyed him to the Common Jail at Hartford, and left with him this mittimus.

ATTEST:

(Signed) FRANCIS J. CHILONE,
Special Deputy Sheriff.

[fol. 5]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

PETITIONER'S REPLY—Filed February 1, 1961

1. So much of the Return of Respondent as alleges that the petitioner's confinement is within the law is denied.

2. With respect to the First Defense of the Return of Respondent, the allegations contained therein are admitted, except where it is alleged in paragraph 2 thereof that the delivery of the petitioner into the keeping of the respondent was a due delivery, which is denied.

Petitioner, By Harold Strauch, His Attorney.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

MEMORANDUM OF DECISION—Filed February 7, 1961

This is an application for a writ of habeas corpus to obtain the release of the petitioner from the common jail to which the petitioner has been committed for his refusal to answer certain questions before the Hon. Ernest A. Inglis, State Referee, who has been designated in accordance with Sec. 54-47 of the General Statutes to conduct an inquiry to determine whether there is probable cause to believe that crimes, including gambling, have been committed in Hartford County.

The petitioner was arrested in a raid on premises at 600 Asylum Avenue, Hartford, on September 11, 1959, and was charged with two counts of pool selling in violation of Sec. 53-295 of the General Statutes. On November 5, 1959, he entered a plea of nolo contendere and was found guilty on one count and was ordered to pay a fine of $500.00 and was given a sentence of one year in the county jail to be suspended after 90 days when the petitioner was placed on probation for two years.

On January 16, 1961, pursuant to a subpoena the petitioner appeared before the Hon. Ernest A. Inglis, a State Referee, who is conducting an inquiry to determine whether there is probable cause to believe that crimes including gambling have been committed in Hartford County. At this hearing the petitioner was asked the following questions and the following transpired:

[fol. 6] Examination by Mr. LaBelle:

Q. What is your name?

A. William Malloy.

Q. Where do you reside?

A. 418 Mattianuck Avenue, Windsor, Connecticut.

Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford? And were you convicted on November 5, 1959, in the Superior Court as a result of that arrest on charges of poolselling?

A. I refuse to answer any questions on the ground it may tend to incriminate me.

Q. You understand, do you, that I am questioning about a matter on which you are already convicted and there can be no incrimination in that?

A. I refuse to answer on the ground that it might incriminate me.

Q. On November 5, 1959, when you were convicted on the arrest made on September 11, 1959, for whom were you working?

A. I refuse to answer on the ground it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in Superior Court on November 5, 1959, who selected your counsel?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. On the same day, September 11, 1959, and for your appearance in court, and you were to appear in superior court on November 5, 1959, who paid your counsel?

A. I refuse to answer.

Q. Who paid your fine for your conviction on November 5, 1959?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. After your arrest on September 11, 1959, the same arrests for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Who paid your bondsman?

A. I refuse to answer on the grounds that it might tend to incriminate me.

[fol. 7] Q. Do I understand you refuse to answer any questions put to you this morning?

A. I refuse to answer the question on the grounds it might tend to incriminate me.

Mr. LaBelle: It seems, Your Honor, the matter has to be referred for contempt.

The Referee: Have you had any advice of a lawyer on this?

The Witness: No, sir, I haven't; I just received my subpoena yesterday.

The Referee: Well, of course, it is up to you, but I suggest you talk with a lawyer. The State's Attorney will see to it that you are cited into court downstairs for contempt, and it might be wise for you to talk to a lawyer between now and then—the time you are summoned in by him.

I will leave this to you, Mr. State's Attorney, to proceed in accordance with the statute. That is all.

On January 25, 1961, the petitioner was recalled as a witness. He was asked the following questions and the following transpired:

Examination by Mr. LaBelle:

Q. You are William Malloy?

A. Yes, sir.

The Referee: And you have already been sworn, haven't you?

A. Yes, sir.

Q. Are you the William Malloy who on September 11, 1959, was arrested at 600 Asylum Street in Hartford?

A. Yes, sir.

Q. And as a result of that arrest are you the William Malloy who was convicted on November 5, 1959, in the Superior Court on charges of pool-selling?

A. Yes, sir.

Q. Now, on September 11, 1959, when you were arrested at 600 Asylum Street, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it might tend to incriminate me.

[fol. 8] Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, who furnished the money to pay your fine when you were convicted in the Superior Court?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, you were sentenced to some time in jail, were you not?

A. Yes, sir.

Q. And while you were in jail on that conviction of November 5, 1959, which resulted from your arrest on September 11, 1959, did you receive any pay from anyone while you were in jail?

A. No, sir.

Q. Did your family receive any pay or any money from anyone while you were in jail?

A. No, sir.

Q. After your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who furnished the money to pay your fine?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. What was the number of the apartment that you were arrested in on September 11, 1959, at 600 Asylum Street?

A. I don't recall the number of the apartment right now.

Q. Was it 823, do you remember that?

A. Offhand I would say I don't remember now.

Q. Do you know whose apartment it was?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. Do you know John Bergoti?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. I ask you again, Mr. Malloy, now, so there will be no misunderstanding of what I want to know. When you were [fol. 9] arrested on September 11, 1959, at 600 Asylum Street in Hartford, and the same arrest for which you were convicted in Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Mr. LaBelle: That's all the questions I have, Your Honor.

The Referee: Very well.

On January 26, 1961, the petitioner, upon the complaint of the State's Attorney, was presented at the criminal session of the Superior Court where after a hearing it was adjudicated that the petitioner had failed to answer proper questions propounded to him under the provisions of Sec. 54-47 of the General Statutes and the petitioner was committed to the common jail at Hartford at his own expense, until he answers proper questions in the course of said investigation or until the further order of the Court.

The claim of the petitioner is that his imprisonment at the common jail is illegal because it is in violation of the Fifth Amendment of the Constitution of the United States and Section 9 of Article 1 of the Constitution of the State of Connecticut. The Fifth Amendment to the Constitution of the United States is restrictive of national action only and does not secure to the petitioner exemption from self incriminations in the state courts. *Twining* v. *New Jersey*,

211 U.S. 78; *McCarthy* v. *Clancy*, 110 Conn. 482. The exemption from self incrimination is guaranteed to citizens of this State by Section 9 of Article 1 of the Constitution of the State of Connecticut which provides that in all criminal prosecutions the accused shall not be compelled to give evidence against himself. This immunity extends to proceedings before a grand jury. *State* v. *Kemp*, 126 Conn. 60, 72.

The question presented by this petition is whether the petitioner was justified in refusing to answer the questions propounded to him when called upon to give evidence before the State Referee. In passing upon this question it must be borne in mind that the privilege against self incrimination provided by the Constitution is solely for the benefit of the witness and not for the protection of others. *Rogers* v. *U.S.*, 340 U.S. 367. In passing upon the issue here involved the Court must determine whether the questions which the petitioner refused to answer were such [fol. 10] that the petitioner believed that to answer them would tend to incriminate him. *State* v. *Kemp*, supra, 73. The mere claim on the part of the petitioner that the evidence will tend to incriminate him is not sufficient. Having made his claim it is for the Court to determine whether, from the circumstances of the case and the nature of the evidence which the petitioner was called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger must be real and appreciable from the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable person would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. *McCarthy* v. *Clancy*, 110 Conn. 482, 489. The privilege of self incrimination, however, extends not only to questions which would in themselves support a conviction but also those which would furnish a link in the chain of evidence needed to prosecute the petitioner for a crime. To sustain the privilege it need

only be evident from the implication of the questions, in the setting in which they are asked, that a responsive answer or an explanation of why they cannot be answered might be dangerous because injurious disclosures can result. *Hoffman* v. *U. S.*, 341 U.S. 479. A consideration of the questions propounded to the petitioner does not evince a danger to the petitioner which is real and appreciable with reference to the ordinary operation of law in the ordinary course of things. The facts here are materially different from the facts before the Court in *Hoffman* v. *U. S.*, supra. In this case the petitioner has already been convicted of the crime of September 11, 1959, to which the questions are directed. He cannot again be charged with that crime or with conspiracy to commit it. He is now on probation and presumably not engaged in any activity which is in violation of law. There is no indication that John Bergoti who was inquired about is engaged in any activity which would place the petitioner in jeopardy by answering the question. In this connection it is to be noted that our Court in In re *Clayton*, 59 Conn. 510, upheld a statute providing that "on the trial of any person prosecuted for intoxication, if he shall be found guilty, it shall be the duty of the prosecuting [fol. 11] officer to request him to disclose ~~under oath~~ when, where and from whom he procured the liquor by which his intoxication was produced . . ." as well as a commitment for contempt for failure to make such disclosure.

Judgment may enter dismissing the writ.

Covello, J.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124068

WILLIAM MALLOY, of Windsor,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

Present: Hon. Frank Covello, Judge.

JUDGMENT—February 7, 1961.

This application by William Malloy, of Windsor, for a Writ of Habeas Corpus alleging that he is unlawfully imprisoned in the County Jail by Patrick J. Hogan, Sheriff of said jail and praying that a Writ of Habeas Corpus issue to the defendant to bring him with the cause of his imprisonment, before said court, came to this court on January 27, 1961, and said writ was granted returnable to the Superior Court at its session to be held on February 1, 1961, and thence to the present time, when the parties appeared and were at issue to the Court, as on file.

The Court, having heard the parties, finds the issues for the defendant and finds that the said William Malloy is not unlawfully imprisoned.

Whereupon it is adjudged that the said William Malloy is not unlawfully imprisoned and said Writ be and hereby is dismissed.

By the Court,

Dominic A. DiCorleto, Assistant Clerk.

[fol. 12]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

APPLICATION FOR CERTIFICATION AND ORDER—
February 8, 1961

The undersigned, in accordance with Section 52-470 of the General Statutes (Revision of 1958) hereby requests a certification to the effect that a question is involved in the decision that was made in the herein case that ought to be reviewed by the Supreme Court of Errors.

Plaintiff, By Harold Strauch.

This certifies that a question is involved in the decision that was made in the herein case that should be reviewed by the Supreme Court of Errors.

February 8, 1961.

Covello, Judge.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124068

WILLIAM MALLOY,

vs.

PATRICK J. HOGAN, Sheriff.

PLAINTIFF'S APPEAL—Filed February 9, 1961

In the above entitled action, the plaintiff appeals to the Supreme Court of Errors from the judgment rendered therein.

Plaintiff, By Harold Strauch, His Attorney.

You, William Malloy, plaintiff in the above entitled action, as principal, and you William J. Burke, of said Hart-

ford, deemed by me to be of sufficient financial responsibility to pay any costs which may be adjudged against William Malloy on his appeal in the above entitled action; as surety, acknowledge yourselves to be bound to the State of Connecticut, defendant in said action, in a recognizance in the sum of One hundred and fifty dollars that the said William Malloy will prosecute the foregoing appeal to full effect and pay any costs for which judgment may be rendered against him.

[fol. 13] Dated at Hartford, Connecticut, this 9th day of February, 1961.

Harold Strauch, Commissioner of the Superior Court.

[File endorsement omitted]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

REQUEST FOR FINDING—Filed February 15, 1961

The appellant in the above entitled case respectfully requests a finding of facts for an appeal to the Supreme Court of Errors and submits the draft finding annexed hereto.

The questions of law which he desires to have reviewed are:

1. Did the Court err in ordering the plaintiff to answer the questions set forth in Exhibits A and B on file.

2. Did the Court err in deciding that the questions asked of the plaintiff were not in such a context that it was apparent that the answers, or an explanation of why no answers would be forthcoming, could be dangerous to the plaintiff as having a tendency to incriminate him.

3. Did the Court err in concluding that answers to the questions asked of the plaintiff could have no tendency to incriminate him.

4. Did the Court err in concluding that the provisions of the Fifth Amendment to the Constitution of the United States, Article 1, Sec. 9, of the Constitution of the State of Connecticut, and Secs. 51-35, 52-199 and 54-47 of the General Statutes, Revision of 1958, were not applicable to the questions asked of the plaintiff and that the insistence that the plaintiff answer said questions would not contravene his rights or privileges thereunder.

5. Did the Court err in concluding that the questions asked of the plaintiff were proper.

[fol. 14] 6. Did the Court err in concluding that the refusal to answer the questions asked of the plaintiff constituted a contempt and that the Court, which sentenced the plaintiff, had the jurisdiction to do so.

Plaintiff, By Harold Strauch, His Attorney.

DRAFT FINDING—Filed February 15, 1961

10. The memorandum of decision may be made a part of this finding for use in any argument before the Supreme Court of Errors.

Plaintiff, By Harold Strauch, His Attorney.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

FINDING

First: The following facts are found:

1. The petitioner was arrested in a gambling raid in Hartford on September 11, 1959, at 600 Asylum Street, and charged with two counts of pool selling in violation of Sec. 53-295 of the General Statutes, Rev. of 1958.

2. The petitioner on November 5, 1959, in the Superior Court for Hartford County, entered a plea of nolo contendere to the first count of an information charging him with pool selling on September 11, 1959, in violation of Sec. 53-295 of the General Statutes.

3. The Court on November 5, 1959, entered a finding of guilty to the first count of the information, and sentenced the petitioner to a fine of $500. and to one year in the county jail with execution of the jail sentence suspended after ninety days and two years probation.

[fol. 15] 4. The petitioner on January 16, 1961, and on January 25, 1961, was and still is on probation pursuant to the sentence of November 5, 1959.

5. On January 16, 1961, the petitioner pursuant to a subpoena, appeared as a witness before the Honorable Ernest A. Inglis, a State Referee, who, pursuant to Sec. 54-47 of the General Statutes, was appointed by the Superior Court to conduct and was conducting an inquiry to determine whether there was probable cause to believe that certain crimes including gambling have been committed in Hartford County.

6. The petitioner was ordered by the Court to reappear as a witness before the Honorable Ernest A. Inglis on January 25, 1961.

7. During his appearance on January 16, 1961, before the Honorable Ernest A. Inglis, a State Referee, the following questions were asked of the plaintiff to which he made the following answers:

Q. What is your name?
A. William Malloy.
Q. Where do you reside?
A. 418 Mattianuck Avenue, Windsor, Connecticut.
Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford? And were you convicted on November 5, 1959, in the Superior Court as a result of that arrest on charges of pool selling?
A. I refuse to answer any questions on the ground it may tend to incriminate me.

Q. You understand, do you; that I am questioning about a matter on which you are already convicted and there can be no incrimination in that?

A. I refuse to answer on the ground that it might incriminate me.

Q. On November 5, 1959, when you were convicted on the arrest made on September 11, 1959, for whom were you working?

A. I refuse to answer on the ground it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in Superior Court on November 5, 1959, who selected your counsel?

[fol. 16] A. I refuse to answer on the ground that it may tend to incriminate me.

Q. On the same day, September 11, 1959, and for your appearance in court, and you were to appear in Superior Court on November 5, 1959, who paid your counsel?

A. I refuse to answer.

Q. Who paid your fine for your conviction on November 5, 1959?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. After your arrest on September 11, 1959, the same arrests for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Who paid your bondsman?

A. I refuse to answer on the grounds that it might tend to incriminate me.

Q. Do I understand you refuse to answer any questions put to you this morning?

A. I refuse to answer the question on the grounds it might tend to incriminate me.

8. During his appearance on January 25, 1961, before the aforesaid State Referee, the following questions were asked of the plaintiff to which he made the following answers:

Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford?

A. Yes, sir.

Q. And as a result of that arrest are you the William Malloy who was convicted on November 5, 1959, in the Superior Court on charges of pool selling?

A. Yes, sir.

Q. Now, on September 11, 1959, when you were arrested at 600 Asylum Street, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, who furnished the money to pay your fine when you were convicted in the Superior Court?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

[fol. 17] Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, you were sentenced to some time in jail, were you not?

A. Yes, sir.

Q. And while you were in jail on that conviction of November 5, 1959, which resulted from your arrest on September 11, 1959, did you receive any pay from anyone while you were in jail?

A. No, sir.

Q. Did your family receive any pay or any money from anyone while you were in jail?

A. No, sir.

Q. After your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who furnished the money to pay your fine?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. What was the number of the apartment that you were arrested in on September 11, 1959, at 600 Asylum Street?

A. I don't recall the number of the apartment right now.

Q. Was it 823, do you remember that?

A. Off hand I would say I don't remember now.

Q. Do you know whose apartment it was?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. Do you know John Bergoti?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. I ask you again, Mr. Malloy, now, so there will be no misunderstanding of what I want to know. When you were arrested on September 11, 1959, at 600 Asylum Street in Hartford, and the same arrest for which you were convicted in Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

[fol. 18] 9. All of the foregoing questions are contained in Exhibits A and B on file.

10. While the plaintiff answered some of the questions that were put to him, he refused to answer the remaining questions on the ground that the answers would tend to incriminate him.

11. The petitioner on January 26, 1961, upon the complaint of the State's Attorney, pursuant to Sec. 54-47 of the General Statutes, was presented at a criminal session of the Superior Court where a hearing was held and it was found by the Court that the petitioner had failed to answer proper questions propounded to him on January 16, 1961, and January 25, 1961, and he thereupon was ordered committed to the common jail at Hartford, at his own expense until he answers proper questions in the course of the aforementioned inquiry or until the further order of the Court.

12. The Superior Court in Criminal Session at Hartford on January 26, 1961, had jurisdiction over the petitioner.

13. All exhibits marked in evidence may be made a part of this Finding for use in any argument before the Supreme Court of Errors without being printed in the record.

Second. The following conclusions have been reached:

14. The petitioner has already been convicted of the crime of September 11, 1959, to which the questions were directed.

15. The petitioner cannot again be charged with the crime of September 11, 1959, or with conspiracy to commit that crime.

16. The questions propounded to petitioner do not indicate a danger to the petitioner of criminal liability which is real and appreciable with reference to the ordinary operation of law in the ordinary course of things.

17. The danger of incrimination to the plaintiff, in the event that he answered the questions propounded to him, was so remote and improbable that he should not have suffered it to influence him in his decision to refuse to answer them.

18. The plaintiff had no reasonable ground to fear or apprehend danger of criminal prosecution as the result of his being compelled to answer the questions that were asked of him.

[fol. 19] 19. The plaintiff could not be charged with any offense as the result of his answers to the questions propounded to him.

20. The compulsory answering of the questions propounded to the plaintiff would not be in violation of his rights under the Fifth Amendment of the Constitution of The United States, Article 1, Sec. 9, of the Constitution of the State of Connecticut, and Secs. 51-35, 52-199 and 54-47 of the General Statutes, Rev. of 1958.

21. The questions propounded to the plaintiff were proper, did not tend to incriminate him, and should have been answered.

22. The refusal of the plaintiff to answer the questions propounded to him constituted contempt.

23. The petitioner did not introduce any evidence and failed to show cause why he should not be punished as for a contempt for failure to answer proper questions before the State Referee.

24. The Superior Court in Criminal Session at Hartford on January 26, 1961, had jurisdiction to sentence the plaintiff for contempt for his refusal to answer the questions propounded to him before the Honorable Ernest A. Inglis, State Referee, on January 16, 1961, and January 25, 1961.

Covello, *J.*

In the Superior Court of Hartford County

State of Connecticut

Assignment of Errors—Filed November 15, 1961

The Court erred:

1. In incorporating in its Finding as a fact that the action of the Superior Court (criminal session) was correct in holding that the plaintiff had failed to answer proper questions propounded to him on January 16, 1961, and January 25, 1961, and that he be committed until he answer proper questions, being a part of paragraph 11 of First of said Finding, without evidence.

2. In finding the facts set forth in paragraph 12 of First of its Finding without evidence.

3. In reaching the conclusion stated in paragraph 15 through 24 of Second of its Finding without evidence to support the same.

4. In refusing to include or incorporate in its Finding paragraph 10 of First of the Draft Finding.

5. In overruling and denying the claims of law contained in paragraphs 1 through 6 of the Request for Finding.

[fol. 20] 6. In overruling and in refusing to include or incorporate in its Finding the claims of law contained in paragraphs 1 through 6 of the Request for Finding, which are as follows:

(a) The Court (criminal side) erred in ordering the plaintiff to answer the questions set forth in Exhibits A and B on file.

(b) The Court (criminal side) erred in deciding that the questions asked of the plaintiff were not in such a context that it was apparent that the answers, or an explanation of why no answers would be forthcoming, could be dangerous to the plaintiff as having a tendency to incriminate him.

(c) The Court (criminal side) erred in concluding that the answers to the questions asked of the plaintiff could have no tendency to incriminate him.

(d) The Court (criminal side) erred in concluding that the provisions of the Fifth Amendment to the Constitution of the United States, Article 1; Sec. 9 of the Constitution of the State of Connecticut; Secs. 51-35, 52-199 and 54-47 of the General Statutes, Revision of 1958, were not applicable to the questions asked of the plaintiff and that the insistence that the plaintiff answer questions would not contravene his rights or privileges thereunder.

(e) The Court (criminal side) erred in concluding that the questions asked of the plaintiff were proper.

(f) The Court (criminal side) erred in concluding that the refusal by the plaintiff to answer the questions asked of him constituted a contempt and that it had the jurisdiction to sentence the plaintiff for contempt.

7. In concluding upon all the evidence that the plaintiff was guilty of contempt in refusing to answer the questions that were put to him as set forth in Exhibits A and B on file.

8. In concluding upon all the evidence that the plaintiff was guilty of contempt beyond a reasonable doubt.

Plaintiff, By Harold Strauch, His Attorney.

[fol. 21]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

CORRECTION TO FINDING—Filed November 27, 1961

The Finding is hereby corrected by adding thereto the following:

Third. The plaintiff made claims of law directly contra to the conclusions reached by the Court.

Notwithstanding the plaintiff's claims of law the Court rendered judgment as on file.

Covello, J.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124067.

EUGENE PICANO

vs.

PATRICK J. HOGAN, Sheriff.

STIPULATION AS TO JUDGMENT IN COMPANION CASES—December 8, 1961

Whereas an appeal in the above entitled case has been taken to the Supreme Court of Errors from the judgment rendered therein, and an assignment of errors has been filed, and whereas all of the issues in such appeal are the same as the issues involved in an appeal which has been taken from the decision of the Superior Court for Hartford County in the case of William Malloy vs. Patrick J. Hogan, Sheriff, Docket No. 124068, now upon the docket of the Supreme Court of Errors; and

Whereas it is desired that but one record be printed to present such issues to the Supreme Court of Errors.

Now, therefore, it is hereby stipulated by the parties that the record in this case shall not be printed, but that any judgment rendered by the Supreme Court of Errors upon the appeal taken in said case of William Malloy vs. Patrick J. Hogan, Sheriff shall be conclusive upon the parties in this case, and that the clerk of the Supreme Court of Errors for Hartford County (the county wherein the judgment was rendered) shall, upon the decision of said case of William Malloy vs. Patrick J. Hogan, Sheriff, enter the same judgment in this case.

Plaintiff, By Harold Strauch, His Attorney.

Defendant, By John D. LaBelle, His Attorney and State's Attorney for Hartford County.

Filed December 31, 1961.

[fol. 22]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124065.

GEORGE POLASHIAN

vs.

PATRICK J. HOGAN, Sheriff.

STIPULATION AS TO JUDGMENT IN COMPANION CASES—
December 8, 1961

Whereas an appeal in the above entitled case has been taken to the Supreme Court of Errors from the judgment rendered therein, and an assignment of errors has been filed, and whereas all of the issues in such appeal are the same as the issues involved in an appeal which has been taken from the decision of the Superior Court for Hartford County in the case of William Malloy vs. Patrick J. Hogan, Sheriff, Docket No. 124068, now upon the docket of the Supreme Court of Errors; and

Whereas it is desired that but one record be printed to present such issues to the Supreme Court of Errors.

Now, therefore, it is hereby stipulated by the parties that the record in this case shall not be printed, but that any judgment rendered by the Supreme Court of Errors upon the appeal taken in said case of William Malloy vs. Patrick J. Hogan, Sheriff, shall be conclusive upon the parties in this case, and that the clerk of the Supreme Court of Errors for Hartford County (the county wherein the judgment was rendered) shall, upon the decision of said case of William Malloy vs. Patrick J. Hogan, Sheriff, enter the same judgment in this case.

Plaintiff, By Harold Strauch, His Attorney.

Defendant, By John D. LaBelle, His Attorney and State's Attorney for Hartford County.

Filed December 31, 1961.

[fol. 23]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

December Term, 1962

WILLIAM MALLOY

v.

PATRICK J. HOGAN, Sheriff of the County of Hartford

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to the court, Covello, *J.*; judgment for the defendant and appeal by the plaintiff. No error.

Harold Strauch, for the appellant (plaintiff).

Harry W. Hultgren, Jr., with whom, on the brief, were John D. LaBelle, state's attorney, and George D. Stoughton, assistant state's attorney, for the appellee (defendant).

OPINION

KING, J. On September 11, 1959, the plaintiff was arrested in a gambling raid at 600 Asylum Street, Hartford, and charged, in two counts, with pool selling in violation of § 53-295 of the General Statutes. Subsequently, on November 5, he was allowed to plead nolo contendere to the first count of the information. A finding of guilty on that count was entered, and he was ordered to pay a fine of $500 and was sentenced to one year in jail, execution of the jail sentence to be suspended after ninety days of service and probation to be in effect for two years. What disposition was made of the second count of the information is not disclosed in the printed record, but the judgment file shows that a nolle prosequi was entered as to that count immediately after the imposition of the sentence under the first count.

At some time prior to January 16, 1961, the Superior Court in Hartford County, pursuant to § 54-47 of the General Statutes, entitled "Investigations into commission of crime," appointed the Honorable Ernest A. Inglis, formerly chief justice of Connecticut and then a state referee, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee, and on January 16, 1961, Malloy, who had been so subpoenaed, appeared and was asked certain questions by the state's attorney. Most of these Malloy refused to answer on the ground that an answer would tend to incriminate him. Thereupon, the state's attorney indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of § 54-47. The referee inquired of Malloy whether he had had the advice of an attorney and he replied that he had not, since he had just received the subpoena. The referee suggested that Malloy consult an attorney before he was summoned for contempt. Apparently, contempt proceedings were not then instituted, since nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. In the meantime, he had had full opportunity to consult counsel. The questions asked him on January 25, which he refused to answer on the same claim of

privilege, were practically identical with those he had been asked on his first appearance before the referee. The questions posed on both occasions are well summarized in Malloy's brief, substantially as follows: (1) For whom did Malloy work on September 11, 1959, the date he was arrested on the charge on which he was convicted? (2) Who selected and paid his counsel in connection with that charge and his defense thereto? (3) Who selected his bondsman and who paid him? (4) Who paid Malloy's fine? (5) What was the name of the tenant in the apartment in which he was apprehended? (6) Did he know John Bergoti?

On January 26, 1961, pursuant to § 54-47, Malloy was brought before the Superior Court and, after a hearing, was found to have failed to answer proper questions before the referee and was ordered committed to jail until he answered the questions or until the further order of the court. Malloy was thereupon committed to jail. Later in the day he made application for a writ of habeas corpus, directed to the defendant as the keeper of the jail, on the ground that the confinement in jail was illegal because it was based on a denial, in violation of the fifth amendment to the constitution of the United States and of § 9 of article first of the constitution of Connecticut, of Malloy's privilege of refusing to answer questions on the ground of self-incrimination. After a hearing on February 7, 1961, the court found the issues for the defendant and that Malloy was not unlawfully confined, and it dismissed the writ of habeas corpus. From that judgment Malloy took this appeal, his basic claim of error being that his refusal to answer the questions was privileged.

The law according the privilege against self-incrimination is not open to question, but there are often difficulties in its application. The privilege is not a general one; it is, [fol. 24] at least in all ordinary situations, to be claimed as to each question asked. *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir.); *McCarthy* v. *Clancy*, 110 Conn. 482, 490, 148 A. 551. It is not a prohibition against inquiry but confers an option of refusal to answer. *State* v. *Kemp*, 126 Conn. 60, 72, 9 A.2d 63. Our decisions from a time antedating the adoption of our constitution in 1818 have

consistently recognized and upheld the privilege, and it was, by § 9 of article first, incorporated in our constitution. See, for instance, *Grannis* v. *Branden*, 5 Day 260, 272 (a malpractice case decided in 1812); *Norfolk* v. *Gaylord*, 28 Conn. 309, 312 (a civil bastardy action decided over a century ago, in 1859). This section provides that an accused in a criminal prosecution "shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law." This language is very similar to that of the fifth amendment to the United States constitution, and cases interpreting the scope and application of the fifth amendment in federal proceedings are not without persuasive force in the interpretation of our own constitutional provision. In *McCarthy* v. *Clancy*, supra, 488, the privilege against self-incrimination was expressly held applicable to a witness subpoenaed in a statutory investigation similar to that in which Malloy was questioned; and in *State* v. *Kemp*, supra, the privilege was held applicable to a witness summoned to appear before a grand jury. It is clear that Malloy was clothed with this privilege when he went before the referee, so that the only question is whether his refusal to answer was justified under the rules governing the exercise of the privilege.

On the one hand, the determination whether a question does or does not tend to incriminate a person cannot be left solely to his judgment, since he could then refuse to answer obviously innocuous questions. On the other hand, if he were required completely to explain the precise basis for his belief that an answer to a given question would tend to incriminate him, he might well lose much, if not all, of the benefit of the privilege, since the state might utilize his explanation to obtain "leads" to evidence for future use against him. *Hoffman* v. *United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118; *Grannis* v. *Branden*, supra.

The rule is well stated in *McCarthy* v. *Clancy*, supra, 488: "[A] witness . . . has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate

him is not sufficient. . . . [He having] made his claim, it is then . . . [necessary for the judge] to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger 'must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Cockburn, C. J., in *Regina* v. *Boyes*, 1 B. & S. 311, 330; see also *Brown* v. *Walker*, 161 U.S. 591, 599, 16 Sup. Ct. 644 [40 L. Ed. 819]; *Mason* v. *United States*, 244 U.S. 362, 37 Sup. Ct. 621 [61 L. Ed. 1198]; *State* v. *Thaden*, 43 Minn. 253, 255, 45 N.W. 447; *State* v. *Wood*, 99 Vt. 490, . . . [134] Atl. 697; *Manning* v. *Mercantile Securities Co.*, 242 Ill. 584, 90 N.E. 238; 4 Wigmore on Evidence (2d Ed.) § 2271 [now 8 Wigmore § 2271 (McNaughton Rev. 1961)]. Moreover, a witness called before such a tribunal as that authorized by the statute in question, against whom no accusation or proceeding is pending, could not advance such a claim as a justification for a failure to answer any question whatsoever which might be asked; for rarely would it happen that all the evidence he might give in regard to the matter under investigation would tend to incriminate him. . . . [B]efore he would be justified in

refusing to answer [a given question], it must appear that there was reasonable ground to apprehend from it some real danger of incrimination. *Eckstein's Petition*, 148 Pa. St. 509, 515, 24 Atl. 63; *Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459. The same rules apply with regard to the production of documents. *Manning* v. *Mercantile Securities Co.*, supra, 592."

If remains to apply these principles to the questions asked Malloy. Only one question, whether Malloy knew John Bergoti, was not directly connected with, and restricted to the date of, Malloy's arrest in 1959 on the [fol. 25] pool selling charge. Bergoti is nowhere described or in any way identified, either as to his occupation, actual or reputed, or as to any criminal record he may have had. Indeed, the same may be said as to Malloy, except for the conviction for pool selling, which antedated his interrogation. Cf. *Hoffman* v. *United States*, 341 U.S. 479, 487, 71 S. Ct. 814, 95 L. Ed. 1118. Malloy made no attempt even to suggest to the court how an answer to the question whether he knew Bergoti could possibly incriminate him. That an answer might have incriminated Bergoti would be immaterial, since Malloy's privilege, such as it was, existed solely for his own personal protection and not for the protection of any other person. *Rogers* v. *United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344. On this state of the record the question was proper, and Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy "chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none." *In re Pillo*, 11 N.J. 8, 22, 93 A.2d 176; see also, *Hoffman* v. *United States*, supra, 489 (wherein it was held erroneous to refuse to consider explanations of a witness as to why he felt his answers to questions asked of him might incriminate him).

We turn now to the other questions asked Malloy, all of which were restricted in time and subject matter to the particular crime for which he was convicted in 1959. We need not decide whether, on their face and apart from any consideration of Malloy's immunity from prosecution,

the questions should or should not have been answered in the light of his failure to give any hint of explanation as to how answers to them could incriminate him. In any event, as hereinafter pointed out, he was apparently clothed with immunity from any prosecution growing out of answers to the questions, and he failed in any way to point out any infirmity in that immunity.

The state's attorney pointed out to Malloy that the questions were "about a matter on which you are already convicted and there can be no incrimination in that." Cf. *United States* v. *Smith*, 4 Day 121, 126. The referee evidently felt that no self-incrimination was involved. This is indicated by his suggestion to Malloy that he consult a lawyer before contempt proceedings were instituted. Of course, Malloy could not again be convicted of the identical crime of pool selling, and if this was the only possible danger of self-incrimination the privilege of refusal to answer would not exist. *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir.). However, the statute, § 53-295, under which the 1959 conviction was had, penalized a number of closely related acts, all basically concerned with pool selling, and as to many of these acts it provided that "each day of . . . [doing the act] shall constitute a separate offense." Even though Malloy could not again be tried on the identical charge on which he was convicted, he was entitled to assert his claim of privilege if there was a danger that his answers to the questions might furnish a "lead" to information which could be used to procure his conviction on a charge based on some other offense committed on the same day or on a charge based on the same or another offense committed on some other day, even the following day. See cases such as *Hoffman* v. *United States*, supra, 486; *Blau* v. *United States*, 340 U.S. 159, 161, 71 S. Ct. 223, 95 L. Ed. 170. Indeed, the second count of the 1959 information had charged the same type of pool selling on the day before the date charged in the first count, on which the conviction was had.

Where the state opposes a claim of privilege from self-incrimination on the ground of immunity from possible punishment—whether the immunity arises from a prior

conviction, from the bar of a statute of limitations, from a pardon, or from any other cause—the state has the burden of proving the adequacy of the protection afforded by the immunity claimed. *United States* v. *Goodman*, 289 F.2d 256, 262 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75; 58 Am. Jur., Witnesses, §84. A collection of cases illustrating the application of this general rule may be found in an annotation in 101 A.L.R. 389. Under the circumstances here, we prefer not to rest our decision on the ground that the state sufficiently sustained its burden of proving the adequacy of the immunity afforded by the 1959 conviction, considered alone.

There remains for consideration immunity arising from the bar of the Statute of Limitations. The maximum permissible penalty for any type of violation of the pool selling statute under which he was convicted (§ 53-295) was a fine of $500 and imprisonment of not over one year. Malloy's crime in 1959 was, therefore, a misdemeanor and not a felony. General Statutes § 1-1. The applicable limitation was "one year next after the offense has been committed." § 54-193. That period had expired before Malloy's interrogation in 1961. The referee's hearing was, in fact, more than a year after the conviction of Malloy and the disposition of the criminal case on November 5, 1959. It is true that the operation of the Statute of Limitations is suspended during periods in which the person charged "fled from and resided out of this state." But Malloy made no claim that he was without the state for any [fol. 26] period. In his habeas corpus application, and also at the hearing before the referee, he gave his residence as Windsor, Connecticut. His 1959 arrest was in Hartford. Under these circumstances, there would be no inference that he was at any time without the confines of the state so as to toll the Statute of Limitations. If at the hearing before the referee Malloy relied on absence from the state to toll the statute, he would have had to advance that claim in order to have it considered by the court on the question of the adequacy of the immunity from punishment provided by the Statute of Limitations. Nothing of this kind was attempted. Under the facts here,

we do not feel that the burden was on the state, at least in the first instance, of negating the naked possibility that the Statute of Limitations was tolled under the exception quoted above. See *State* v. *Lee*, 69 Conn. 186, 199, 37 A. 75. If, and to the extent that, cases such as *People* v. *Rockola*, 339 Ill. 474, 477, 171 N.E. 539, would require a holding to the contrary in this particular case, we cannot follow them.

Malloy did suggest that on a felony charge—what felony charge he did not specify—the applicable limitation would be five years. See General Statutes § 54-193; *In re Pillo*, 11 N.J. 8, 21, 93 A.2d 176. As far as appears, the only criminal activity in which Malloy had ever engaged was the misdemeanor of pool selling, and this only in September, 1959. There is nothing to indicate any danger to Malloy of a prosecution for any felony. Malloy also mentioned, before us, a possible prosecution for conspiracy to commit some unspecified crime, and something was made of the fact that the Statute of Limitations on a continuing conspiracy does not start to run until the last overt act is committed. *State* v. *Kemp*, 126 Conn. 60, 85, 9 A.2d 63. There is nothing to suggest a continuing conspiracy. Nor is there anything to indicate any possible danger to Malloy of a prosecution for any conspiracy other than perhaps a conspiracy to violate the pool selling statute. For such a conspiracy, the limitation is but one year, since it is the same for a conspiracy to commit a misdemeanor as for the misdemeanor itself. General Statutes §54-197. In all this, Malloy confounds vague and improbable possibilities of prosecution with reasonably appreciable ones. Under claims like his, it would always be possible to work out some finespun and improbable theory from which an outside chance of prosecution could be envisioned. Such claims are not enough to support a claim of privilege, at least where, as here, a witness suggests no rational explanation of his fears of incrimination, and the questions themselves, under all the circumstances, suggest none.

Although the claim was not made by Malloy, it is true that the state did not prove, as clearly as would have been desirable, that there was no prosecution of any sort actually instituted and outstanding against Malloy to which

the Statute of Limitations would not be an effective bar. *United States* v. *Goodman*, 289 F.2d 256, 263 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75. That there was no such prosecution was, however, implicit in the statement of the state's attorney to Malloy that he could not be incriminated by answering the questions, and Malloy makes no claim that there was any such prosecution. Under all the circumstances, and in the absence of any hint of explanation from Malloy, we do not think that it is necessary, in this particular case, to reverse the court below because the state went no further in its evidence on this point.

The fifth amendment does not apply, as such, to state courts. *Cohen* v. *Hurley*, 366 U.S. 117, 118 n.1, 81 S. Ct. 954, 6 L. Ed. 2d 156. However, the fourteenth amendment, in its guarantee of due process, probably does prohibit a state court from so ruling on a claim of privilege from self-incrimination as to violate the fundamental concepts of justice and a fair trial. Ibid.; *Adamson* v. *California*, 332 U.S. 46, 51, 67 S. Ct. 1672, 91 L. Ed. 1903. But as already pointed out, Malloy did not, in respect to any of the questions he refused to answer, bring himself within the settled rules defining the right to assert a privilege against self-incrimination. Thus there could be no violation of due process, and there was no error in Malloy's commitment for contempt.

There is no error.

In this opinion the other judges concurred.

[fol. 27]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

No. 5244

On Appeal from Superior Court

Hartford County

WILLIAM MOLLOY, of the Town of Windsor, County of Hartford, and State of Connecticut,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

JUDGMENT—January 3, 1963

This appeal by the plaintiff from the judgment of said Superior Court was allowed by said Court on the 9th day of February 1961.

On the 15th day of November 1961, the appellant filed his assignments of error claiming error in the record, judgment, proceedings and decisions of said Court on questions of law arising in the trial as may appear in the certified transcript of record on file in this Court, and said appeal came to this Court at its term holden on the first Tuesday of December 1961, when the parties appeared and thence by continuance to the present term.

This Court, having heard the parties, finds that in the record, judgment, proceedings and decisions of said Court there is no error.

It is therefore considered and adjudged that there is no error.

and that the defendant recover of the plaintiff his costs taxed at ..... dollars and ..... cents.

Judgment entered January 3, 1963. By the Court,

Raymond G. Calnen, Clerk.

[fol. 28] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 29]

SUPREME COURT OF THE UNITED STATES

No. 1031—October Term, 1962

WILLIAM MALLOY, Petitioner,

vs.

PATRICK J. HOGAN, Sheriff of Hartford County.

ORDER ALLOWING CERTIORARI—June 3, 1963

The petition herein for a writ of certiorari to the Supreme Court of Errors of the State of Connecticut is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.